

**Maryland General Assembly
Department of Legislative Services**

**Proposed Regulation
Department of Natural Resources
(DLS Control No. 14-219)**

Overview and Legal and Fiscal Impact

This regulation implements a written agreement between the Department of Natural Resources and members of the oyster industry to create a power dredge study area in Eastern Bay. The regulation authorizes the department to take certain management actions with respect to power dredge study areas by public notice. Finally, the regulation adjusts the coordinates of existing power dredge areas in Dorchester County, St. Mary's County, and Somerset County to account for shoreline erosion and eliminate overlap with areas reserved for other gear types.

The regulation presents no legal issues of concern, but additional comments have been included in the special notes section below for the committee's consideration.

The regulation implements an agreement with the oyster industry which is expected to require \$150,000 to \$250,000 of State special and reimbursable funds in fiscal 2015. These costs are already accounted for within existing special and reimbursable fund appropriations in the fiscal 2015 budget.

Regulation of COMAR Affected

Department of Natural Resources:

Fisheries Service: Oysters:
COMAR 08.02.04.12

Legal Analysis

Background

Power dredging is a method of harvesting oysters using a dredge pulled behind a power boat. Unlike handscrapes, which are lifted from the water without mechanical assistance, power dredges are typically brought up from the bottom by a hydraulic winder. This allows for the use of a larger, more efficient dredge. The commercial advantage of power dredging over other harvest methods is that it allows the operator to cover a larger area in a shorter amount of time, allowing harvesting in areas where oysters are scattered.

Proponents of power dredging argue that it helps revitalize oyster bars by uncovering buried shell and keeping bars cleared of silt. However, a study conducted by the Department of Natural Resources and submitted to the General Assembly in 2004 disputes this claim. The study found no statistical difference in the average spat set (the number of juvenile oysters settling on the bottom) in the power dredge areas before power dredging was allowed or

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afterwards. Moreover, power dredging can result in the removal of mature oysters and damage to the structure of oyster reefs. The study concluded that, while areas that received consistent spatfall were capable of sustaining some level of power dredging, areas with sporadic recruitment experience rapid decline when open to power dredging.

Power dredging is currently allowed only in limited areas of the lower Chesapeake Bay. Recent years have seen the introduction of several bills that would require the department to open waters north of the Chesapeake Bay Bridge to power dredging. Although none of these bills have passed, the department has been working with members of the oyster industry on the development of a pilot project to evaluate the potential effects of expanding power dredging in the region. On April 3, 2014, the department and industry representatives issued a written statement describing the pilot project and agreeing to the following points:

- A power dredge fishery should not place further risk to the region's oyster population.
- The size of any 'new' power dredge area should be proportional to the amount of area that the oyster industry would agree to plant with hatchery spat-on-shell.
- The spat on shell will be planted at a minimum density of one million spat-on-shell per acre.
- There will be a collaborative monitoring program implemented by all parties to this agreement. The monitoring program will be designed to examine the impacts of power dredging and the cost effectiveness of using power dredging to enhance the natural production of oysters as compared to using hatchery-spat-on-shell planting.
- This pilot project will have a five-year term and may be extended upon the consent of all parties.

Summary of Regulation

The regulation implements the written agreement between the department and representatives of the oyster industry establishing a five-year "Pilot Study for Evaluating the Impacts and Benefits of Expanding Power Dredging in Waters above the Chesapeake Bay Bridge and Kent Narrows Bridge, and in Eastern Bay." The study area, known as the Wild Grounds Study Area, is defined to encompass all of Eastern Bay.

The regulation allows the department to open, close, and set gear restrictions for both the new Wild Grounds Study Area and existing power dredge study areas in Kent County by public notice. If the department determines that action is necessary to maintain surface shell in any of the power dredge study areas, the department may establish rules concerning maintenance activities by public notice as well. The department must publish any public notice issued under the regulation to the Fisheries Service website at least 48 hours before the actions contained in the public notice become effective. The department must also make a reasonable effort to disseminate public notices through other media. A violation of a restriction established by public notice shall be deemed a violation of the regulation.

Lastly, the regulation updates the coordinates of existing power dredge areas in Dorchester County, St. Mary's County, and Somerset County to account for shoreline erosion and eliminate overlap with areas reserved for other gear types.

Legal Issue

The regulation presents no legal issues of concern.

Statutory Authority and Legislative Intent

The department cites § 4-215 of the Natural Resources Article as authority for the regulation. This section requires the department to prepare fishery management plans that contain descriptions, objectives, and conservation and management measures for specified species, including oysters. Under § 4-215(f), a fishery management plan may include any measures, requirements, or conditions and restrictions necessary and appropriate for management of the species. The department is required to adopt fishery management plans and any measures implementing those plans by regulation.

This authority is correct and complete. The regulation complies with the legislative intent of the law.

Special Notes

In a 2013 letter to the Chair of the AELR Committee, the Attorney General concluded that the department has the authority under § 4-215 of the Natural Resources Article to adopt regulations that allow certain fisheries management actions to be taken by public notice. However, the Attorney General encouraged the General Assembly to consider making clear the precise contours of the department's public notice authority. Two cross-filed bills, SB 145/HB 145 were introduced in the 2014 legislative session to clarify the department's authority with regard to implementing fisheries management actions through public notice (such as posting on the department website), rather than through notice and comment rulemaking procedures established by the Administrative Procedure Act. SB 145 was withdrawn following a hearing before the Senate Education, Health, and Environmental Affairs Committee and HB 145 was referred to interim study by the House Environmental Matters Committee.

Fiscal Analysis

The regulation implements an agreement with the oyster industry which is expected to require \$150,000 to \$250,000 of State special and reimbursable funds in fiscal 2015. These costs are already accounted for within existing special and reimbursable fund appropriations in the fiscal 2015 budget.

Agency Estimate of Projected Fiscal Impact

The department advises that the regulation has no impact on State or local governments. The Department of Legislative Services concurs that the regulation does not have a State budgetary impact and concurs that the regulation has no impact on local governments. The regulation implements the agreement between the department and representatives of the oyster

industry to undertake a five-year power dredging pilot study. The study will use, in fiscal 2015, roughly \$150,000 to \$250,000 of State special (Oyster Tax Fund) and reimbursable (Maryland Port Administration) funds. These funds, however, are expected to come out of existing fiscal 2015 appropriations.

The agreement and this regulation are not expected to significantly affect future year spending in comparison to oyster program spending that would have otherwise occurred.

Impact on Budget

There is no expected impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

The department advises that the regulation has a meaningful economic impact on small businesses in the State to the extent that shifting certain areas from being open to harvesters that use hand tongs and diving to being open to harvesters that use power dredges negatively impacts hand tong users and divers and benefits power dredge users. The Department of Legislative Services generally disagrees that the regulation has an immediate meaningful impact on small businesses, based on indications from the department that there is very little to harvest in the areas that are shifted to power dredging. Small businesses may benefit, however, in future years, from harvesting of oysters planted in accordance with the agreement.

Contact Information

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